

COMPLIANCE BOARD OPINION NO. 03-14

July 24, 2003

Mr. Michael Powell
Managing Editor
The Frederick News-Post

The Open Meetings Compliance Board has considered your complaint concerning the Board of County Commissioners of Frederick County. The complaint alleged that the County Commissioners violated the Open Meetings Act in connection with a “strategic planning and goal setting session” conducted on March 24, 2003. For the reasons set forth below, the Compliance Board finds that, although some of the discussion at the March 24 session concerned topics that were not subject to the Open Meetings Act, other discussion topics were within the Act’s coverage. Because these aspects of the discussion were closed to the public without justification under the Act, the County Commissioners violated the Act.

I

Complaint and Response

The complaint alleged that the County Commissioners violated the Open Meetings Act on March 24, 2003, when they conducted a strategic planning session behind closed doors. The complaint argued that this discussion should have been conducted in an open session. The complaint further alleged that the County Commissioners violated the Act by their failure to conduct a vote on that date, prior to meeting in closed session. Included with the complaint were documents produced in connection with last year’s planning session as evidence of the apparent subject of the meeting and a newspaper account of the meeting as reported in *The Frederick News-Post*.

The article described the strategic planning meeting as a seven-hour, closed session conducted at Pinecliff Park. The President of the Board of County Commissioners was quoted as describing the meeting as a discussion of “[b]road themes, broad concepts, big-picture issues.” The article noted that the County Commissioners viewed the meeting as an “executive function” excluded from the

coverage of the Act. *See* §10-503(a)(1)(i).¹ The County Administrator, who attended the meeting, stated, “[w]e all know the areas we could and could not talk about, and we didn’t cross the line.” Another member of the Board of County Commissioners was quoted as explaining the purpose of the meeting as follows: “We kind of established what we wanted to take a look at, as far as managing the government for the next four years. No decisions were made on anything.”²

In a timely response on behalf of the Board of County Commissioners, John S. Mathias, Esquire, the County Attorney for Frederick County, denied that a violation occurred.³ The response indicated that the strategic planning session was attended by the five Commissioners, the County Manager, and the County Administrative Officer. The purpose was to begin the strategic planning process for fiscal year 2004. Strategies, goals, and objectives were identified for consideration and adoption by the County Commissioners at a future open session. Although it had not yet been determined when this session would be held, it was expected to occur some point before the start of the fiscal year, July 1, 2003.

Following the March 24 session, staff prepared a preliminary draft document titled “Strategic Planning & Goal Setting,” a copy of which was included with the County Commissioners’ response. The document identified four goals:

- I. To develop a long-range financial plan, which incorporates funding mechanisms to meet projected capital and operating needs.
- II. To plan, adequately fund, and build needed infrastructure consistent with the County Comprehensive Plan.

¹ All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

² The Compliance Board first received a prospective complaint from Mr. Powell after the County Commissioners voted on January 28, 2003, four to one, to conduct the strategic planning meeting in closed session. *See* §10-502.6. Our counsel in the Attorney’s General’s Office then contacted the County Attorney, who indicated not only that the meeting had not yet actually been scheduled but also that it was still unclear at that point whether the meeting would be subject to the Act. Because the nature of the meeting had not yet been determined, no attempt was made to evaluate the application of the Act at that time. This complaint was filed following the County Commissioners’ strategic planning session on March 24.

³ The Compliance Board granted the County Commissioners’ request for a brief extension of time in which to respond to the complaint. Litigation-related demands on the time of our counsel resulted in a delay in the preparation of this opinion.

- III. To assure orderly, balanced and responsible business and residential development supported with public services and infrastructure.
- IV. To improve the effectiveness and efficiency of County Government.

The draft identified several objectives for fiscal year 2004 in connection with each goal. The County Commissioners' response also included a copy of the County's strategic plan for fiscal year 2003. While the identified goals remained substantially the same, some of the objectives changed, as might be expected, as prior projects apparently were completed or the priority of items changed.

Under Frederick County's form of government, the County Commissioners perform both executive and legislative responsibilities. The County Commissioners' position is that in conducting the strategic planning session, March 24, they were engaged in an executive function. Thus, neither the substantive nor procedural requirements of the Open Meetings Act, including the need to conduct a vote before meeting in closed session, applied. *See* §10-503(a)(1)(i).

The County Commissioners indicated that they did not discuss any potential changes to legislation. While acknowledging that "[s]everal of the possible objectives, if eventually selected would require future legislative action ...," their position is that, in identifying possible objectives, they were engaged in an executive function rather than a legislative function.⁴ The County Commissioners also noted that they lack authority to adopt certain tax measures mentioned in the proposed objectives without first obtaining enabling legislation from the General Assembly; thus, they "could not be performing any legislative function."

The County Commissioners' response indicated that "[o]ne of the primary purposes of the strategic plan is to identify priorities for the upcoming fiscal year so that County staff can be appropriately deployed. This is important for the annual budget preparation. By identifying priorities, budgeted funds can be allocated where

⁴ The response noted that, "[b]efore this strategic planning session was held, the Board of County Commissioners was advised that the line between an executive and legislative function would be crossed if the Board discussed the contents or substantive provisions of any legislative proposal. The Board was very careful not to discuss what should be included in any legislative act during the March 24 gathering. Instead, the County Commissioners simply decided either to continue an objective as part of the strategic plan or identify other possible objectives which might be included" The County Commissioners drew an analogy to a state or local governmental structural where legislative and executive responsibilities are separated. "In this instance, the Governor or County Executive would establish the strategic plan. By analogy, this is an executive function."

they are most needed. Appropriate County staffing levels can also be reviewed before the budget is prepared.” In other words, the next year’s budget can be prepared with the County Commissioners’ priorities in mind. The County Commissioners noted that they are required by law to adopt a balanced budget before the start of each fiscal year. Their position is that “[t]he identification of goals and objectives is an important step in preparing the annual budget,” which is an executive function.

The County Commissioners also offered an alternative explanation of why the Open Meetings Act did not apply. The response noted that the Act does not apply to a meeting of a committee of a local government’s counterpart to the Governor’s cabinet. *See* §10-502(h)(3)(viii).⁵ The County Commissioners referred to a 1993 Compliance Board opinion in which we decided that regularly scheduled “Directors’ meetings” of the Frederick County Commissioners and County department heads were not subject to the Act, because the Directors’ meeting was the local equivalent of a cabinet meeting. Compliance Board Opinion 93-10 (October 15, 1993), *reprinted in 1 Official Opinions of the Open Meetings Compliance Board* 50. It was suggested that the County Commissioners, the County Manager, and the County Administrative Officer “are part of the local government’s counterpart to the Governor’s cabinet and as such form a committee of the counterpart of the executive council.”

II

Public Body

The Open Meetings Act applies only if a “public body” is holding a “meet[ing]”⁶ on a topic that is not excluded from the Act. We first address the contention of the County Commissioners that the strategic planning session was not a meeting of a “public body” as defined by the Act because it, in effect, involved a committee of the local government’s counterpart to a committee of the Governor’s

⁵ The statute reads:

“Public body” does not include:

...
(viii) a local government’s counterpart to the Governor’s cabinet, Executive Council, *or any committee of the counterpart of the Executive Council*

(Emphasis supplied.)

⁶ “Meet” is defined for purposes of the Open Meetings Act as “to convene a quorum of a public body for the consideration or transaction of public business.” §10-502(g).

cabinet. If we were to agree with this argument, the question whether the Commissioners were engaged in an executive function would be moot.

The County Commissioners correctly point out that we have previously held that meetings of the Board of County Commissioners of Frederick County and the heads of county agencies were not subject to the Open Meetings Act, because the meetings would be the local equivalent of a Governor's cabinet meeting. *See* Compliance Board Opinion 93-10. In reaching that decision, however, we cautioned that "[t]he 'local counterpart to the Governor's Cabinet' has a status as such only when it is truly a counterpart for executive branch policy guidance. The 'counterpart' concept does not extend to actions of the Board of County Commissioners taken in a role other than that of executive branch decisionmaker."¹ *Official Opinions of the Maryland Open Meetings Compliance Board* at 52.

Similarly, a committee of the local government's counterpart to the Governor's cabinet would only have a status as such when it truly is a counterpart to a cabinet committee. Committees of the Governor's cabinet have traditionally been established through the formality of an executive order or by statute. *See, e.g.*, Executive Order 01.01.1996.05 (Cabinet Council on Criminal and Juvenile Justice); §9-1406 of the State Government Article (Smart Growth Subcabinet). The County Commissioners have offered no evidence that they have formally established a cabinet-level committee consisting of the Commissioners, County Manager, and County Administrative Officer that might reasonably be considered the equivalent of a committee of the Governor's cabinet. Moreover, even if a cabinet committee or counterpart less formally established might qualify, surely something more is required to constitute a committee than the simple presence of certain officials at a meeting. Consequently, we hold that, when they met on March 24, the County Commissioners were sitting as a "public body."

III

Executive Function

The Open Meetings Act requires a two-part test for evaluating whether a matter is an executive function: First, does the matter fall within the definition of any of the Act's other "functions" (pertinent here, legislative or quasi-legislative)?⁷ If so, the executive function exclusion does *not* apply. §10-502(d)(2). *See, e.g.*, Compliance Board Opinion 01-7 (May 8, 2001), slip op. at 3-4. Second, if another defined function is not involved, does the matter involve "the administration of" a State or local law or a public body's rule, resolution, or bylaw? §10-502(d)(1). If so,

⁷ There is no possibility that, at the March 24 session, the County Commissioners were carrying out an advisory, judicial, or quasi-judicial function.

the executive function exclusion *does* apply (except for zoning and licensing matters). §10-503.

One gloss on the executive function exclusion is also important here, having to do with the budget process. When, as is true in Frederick County,⁸ the law defines a budgetary process in which the County Commissioners are involved in *both* developing a budget through various preliminary steps *and*, as a legislative body, ultimately reviewing the budget once it is formally submitted, the former phase of the process is an executive function. *See Board of County Comm'rs of Carroll County v. Landmark Community Newspapers*, 293 Md. 595, 446 A. 2d 63 (1982). *See also, e.g.*, Compliance Board Opinion 97-16 (December 2, 1997), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 261; Compliance Board Opinion 99-10 (July 14, 1999), *reprinted in 2 Official Opinions of the Maryland Open Meetings Compliance Board* 64.⁹

Often, “the key issue is whether the matter under discussion involves the administration of an *existing* law or policy, as distinct from a step in the process of creating new law or policy.” Compliance Board Opinion 01-7, at 4. Judging from the draft statement of goals and objectives that emerged from the March 24 strategic planning session, the County Commissioners are surely right in characterizing elements of that day’s discussion as executive functions excluded from the Act. Some are undoubtedly not part of a legislative or other defined function, and they do involve administration of existing law or policy. Examples of these topics (drawn from the objectives in the draft statement) include “Develop studio and expand production of programs for Video Services/Channel 19” and “Continue implementation of ‘one-stop’ permit shop.” Other topics appear to be integrally linked to budget preparation (for example, “Provide adequate staff and resources for the Utilities and Solid Waste Management Division to ensure timely completion of projects and appropriate level of service to the public”). Because the Act did not apply to discussion of these topics, a closed meeting was permissible, and no vote was required.

We cannot accept the County Commissioners’ contention, however, that none of the March 24 discussion involved any aspect of new policy development. It may

⁸ *See* Frederick County Code, §§ 2-7-1, *et seq.*, and 1-8-21, *et seq.*

⁹ In *Landmark*, the Carroll County Commissioners had previously adopted a resolution governing the local budgetary process that bifurcated the County Commissioners’ role in preparation of the budget versus approval of the budget. The County argued that the former was an executive function. While *Landmark* was decided based on the lack of subject matter jurisdiction, the Court of Appeals noted that “[m]uch is to be said for [Carroll] County’s argument that the acts [at issue] are part of an executive function.” 293 Md. at 605.

be, as the Commissioners pointed out, that they were “very careful not to discuss what should be included in any legislative act during the March 24 gathering.” Yet, the identification of priorities is manifestly a key part of policy formulation. To borrow terminology from a leading analyst of congressional decision making, a legislative body must distinguish between situations (states of affairs, often troublesome) and problems (situations calling for legislative attention). John W. Kingdon, *Agendas, Alternatives, and Public Policies* (2d ed. 1997). Given the limits of time and other finite resources, not every troublesome situation can be categorized as a problem. Consequently, policymakers’ identification of a problem, assigning it a place on the policy-setting agenda, is a first and often crucial step in policy making. Advocates have a keen interest in a public body’s process of sorting out what will receive future policy making attention and what will not. For this reason, we have consistently held that a meeting at which a policy matter is identified as ripe for action, even if no substantive discussion occurs, is subject to the Act. *See* Compliance Board Opinion 01-02 (January 12, 2001); Compliance Board Opinion 96-03 (April 9, 1996), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 157.

The draft statement prepared for the Commissioners after the meeting includes as an objective, for example, “Review and amend the Adequate Public Facilities Ordinance.” Surely the setting of a priority for amending the ordinance marked the start of a policy process, not merely the administration of existing law. Hence, this discussion, like any other identifying changes in law as an objective to be pursued by the Commissioners, was not excluded from the Act as an executive function. The draft objectives included ones related to pursuing a lodging and tourism tax, a local transfer tax, and a zoning ordinance update. Another topic was couched in very broad terms: “Identify, review, and propose long-term water solutions (12-50 years).” Even if any or all of these were outside the legislative function, they did not involve administration of existing law. Therefore, they were not encompassed by the executive function exclusion. A topic of discussion that is not within *any* defined function is covered by the Act. Compliance Board Opinion 94-7 (August 16, 1994), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 96, 98-99.

In suggesting that the identification of potential goals and objectives involved an executive function, the County Commissioners find support in Compliance Board Opinion 02-9 (July 1, 2002). “The [Compliance] Board concluded that the Carroll County Commissioners were engaged in an executive function in reviewing impact fee calculations and water and sewer rate calculations. ... At the March 24 gathering, the Frederick County Commissioners were not even reviewing calculations under current legislation. They were considering an earlier step in the process: the possible identification by the Commissioners of certain items for future review. ...”

The Compliance Board opinion relied on by the County Commissioners is inapposite on its facts. Our determination that the meeting concerning impact fees was an executive function was premised on our understanding that it involved a staff briefing to educate the County Commissioners on procedures employed in the administration of the then-current impact fee ordinance. Discussion did not extend to potential changes that might be considered. *Id.*, slip op. at 5. Similarly, discussions concerning water and sewer rates involved the effect on rate increases that might be imposed under an existing contract with an outside entity under various hypothetical scenarios. Under the facts presented, we equated the briefing with an expenditure forecast, important to the County's budgetary position in future years. *Id.*, slip op. at 5-7. Neither meeting involved the setting of policy priorities, which would have taken the meeting outside of the executive function.

IV

Conclusion

The March 24 strategic planning session conducted by the Frederick County Commissioners in a closed session included elements that were not subject to the Open Meetings Act. With respect to these aspects of meeting, the closing was lawful, and none of the procedural requirements under the Act, such as the need for a recorded vote before a closed session, applied. Other matters considered during the course of the session transcended the limits of the executive function exclusion. These portions of the March 24 meeting should have been open to public observation, in the absence of a proper assertion of an exception under §10-508.¹⁰ In this respect, the County Commissioners violated the Open Meetings Act.

OPEN MEETINGS COMPLIANCE BOARD

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¹⁰ As the complaint implied by objecting to the Commissioners' failure to conduct a vote before meeting in closed session, asserting an exception would have required compliance with the Act's procedural requirements. The County Commissioners obviously did not follow these procedures, because they believed that the executive function exclusion excused them from the need to do so.